

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CENTRAL ISLIP DIVISION

THE COUNTY OF ALLEGANY

Plaintiff

v.

PURDUE PHARMA L.P., *et al.*,

Defendants.

Civ. No. 2:19-cv-04891(RRM) (SLT)

**MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION FOR AN EXPEDITED
HEARING ON PLAINTIFF’S MOTION TO REMAND**

Express Scripts, Inc.; CVS Health Corporation; Caremark Rx, L.L.C.; CaremarkPCS Health, L.L.C.; Caremark, L.L.C.; CaremarkPCS, L.L.C.; UnitedHealth Group Incorporated; Optum, Inc.; OptumRx, Inc.; Prime Therapeutics, LLC; Navitus Holdings, LLC; and Navitus Health Solutions, LLC (collectively, the “Moving Defendants”) submit this memorandum in opposition to Plaintiff’s motion for an expedited hearing on Plaintiff’s motion to remand. Dkt. No. 15.

There is no urgency or merit to Plaintiff’s motion to remand. The only reason Plaintiff seeks to rush resolution of its remand motion is to evade the Judicial Panel on Multidistrict Litigation’s (“JPML”) likely order transferring this lawsuit to *In re National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Ohio 2017) (“Opiate MDL”). To date, more than 2,000 cases have been transferred to, or filed in, the Opiate MDL. There are numerous cases in the Opiate MDL with overlapping or nearly identical issues to this action, many of which originated in New

York. Indeed, several other federal courts in this district and other districts in New York have issued stays in virtually identical cases filed by the same Plaintiffs’ counsel, against the same group of defendants, and based on the same procedural and jurisdictional issues that are present here. *See* Text Order, *City of Auburn v. Purdue Pharma L.P.*, No. 2:19-cv-03800 (E.D.N.Y. Sept. 6, 2019) (Azrack, J.) (temporarily staying proceedings in a substantially similar case related to opioids, pending final transfer decision by the JPML); *see also* Text Order, *City of Ogdensburg v. Purdue Pharma L.P.*, No. 8:19-cv-00782 (N.D.N.Y. Sept. 10, 2019), Dkt. No. 79 (granting defendants’ motion to temporarily stay proceedings pending final transfer decision by the JPML in a substantially similar case related to opioids); Text Order, *City of Saratoga Springs v. Purdue Pharma L.P.*, No. 1:19-cv-00789 (N.D.N.Y. Sept. 10, 2019), Dkt. No. 79 (same); Text Order, *City of Rochester v. Purdue Pharma L.P.*, No. 6:19-cv-06490 (W.D.N.Y. Sept. 23, 2019), Dkt. No. 62 (same).

A conditional transfer order (“CTO”) by the JPML is not a basis for expediting resolution of Plaintiff’s remand motion. Instead, it provides a basis for exactly the opposite action: the issuance of the CTO strongly counsels deferring resolution of the motion to remand until the JPML issues its final decision on whether to transfer this action to the Opiate MDL.¹ This is especially true where, as here, the precise jurisdictional issues—removal under theories of severance and fraudulent misjoinder—have already arisen in cases transferred to the Opiate MDL and are before the Opiate MDL Court. Such issues should be resolved in a consistent manner by the Opiate MDL Court. *See North v. Merck & Co.*, No. 05-cv-6475L, 2005 WL 2921638, at *2 (“[T]he objectives of the MDL process—namely the avoidance of inconsistent rulings and the conservation of judicial

¹ On September 20, 2019, the Moving Defendants filed their letter requesting leave to file a motion to temporarily stay proceedings pending a final decision by the JPML, along with a proposed briefing schedule. Dkt. No. 13.

resources—are best met by allowing the MDL Court to decide the plaintiff’s motion to remand.”). Plaintiff’s motion to expedite thus fundamentally misconstrues JPML procedures and the purpose of a CTO. Accordingly, the Court should deny Plaintiff’s motion and should issue a stay.

BACKGROUND

Plaintiff commenced this action on June 14, 2019. On August 27, 2019, the Moving Defendants removed this action to this Court, based on diversity jurisdiction under 28 U.S.C. §§ 1441, 1332, and 1446. *See* Dkt. No. 1. On September 26, 2019, Plaintiff moved to remand this case to state court. *See* Dkt. No. 14. That same day, Plaintiff filed its motion for an expedited hearing on its motion to remand. *See* Dkt. No. 15.²

This action involves allegations against manufacturers, distributors, pharmacies, pharmacy benefit managers, and others arising from the sale, marketing, and distribution of prescription opioid medications. This action is similar to thousands of cases that are pending in the Opiate MDL, which the JPML established on December 5, 2017. Accordingly, after receiving the Moving Defendants’ notification of this case, the JPML conditionally transferred this case to the Opiate MDL on September 11, 2019, pending the JPML’s final determination on transfer. *See* Conditional Transfer Order, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Sept. 11, 2019), Dkt. No. 5583. Plaintiff objected to the conditional transfer on September 18, 2019, and briefing is expected to be completed by October 31, 2019. *See* Text Order, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Sept. 19, 2019), Dkt. No. 5660. The JPML

² On September 26, 2019, (without filing pre-motion conference letters, and before its motion was fully briefed, *see* Individual Rules of District Judge Roslynn R. Mauskopf Rule III.A.), Plaintiff filed on ECF its: (1) motion to remand (Dkt. No. 14); and (2) motion for an expedited hearing (Dkt. No. 15). To preserve their rights, the Moving Defendants have filed their opposition to Plaintiff’s motion to expedite on ECF and served Plaintiff with their papers.

will likely make a final decision on or shortly after the next bimonthly hearing date of December 5, 2019.

ARGUMENT

Plaintiff's motion to expedite should be denied because there is simply no urgency here. Plaintiff argues that the resolution of its motion to remand should be expedited for the sole reason that "the instant action is now included on CTO-111," and "[u]nless this Court rules on the jurisdictional matters raised by Plaintiff's remand motion before the next JPML hearing, Plaintiff will be subject to a court without jurisdiction over its action." Dkt. No. 15 at 5–6.

But the issuance of a CTO is standard and routine under the JPML rules and is not a basis for expediting resolution of Plaintiff's Motion to Remand. To the contrary, the issuance of the CTO signals that the case should be transferred to the Opiate MDL because it appears to "involve questions of fact that are common to the actions previously transferred to the Northern District of Ohio and assigned to Judge Polster." *See* Conditional Transfer Order, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Sept. 11, 2019) Dkt. No. 5583. The JPML, alone, has issued hundreds of CTOs for the Opiate MDL since last year and continues to do so on a daily basis.

Indeed, judicial economy strongly counsels in favor of the Opiate MDL Court deciding these issues. Over one hundred cases removed on the basis of diversity jurisdiction, under theories of fraudulent misjoinder or severance, are currently pending before the Opiate MDL Court. In these cases, as discussed more fully in the forthcoming motion to stay, district courts across the country routinely issued a stay of proceedings. *See e.g.*, Text Order, *City of Auburn*, No. 2:19-cv-03800 (temporarily staying proceedings in a substantially similar case, pending final transfer decision by the JPML); Text Order, *City of Ogdensburg*, No. 8:19-cv-00782, Dkt. No. 79 (granting

defendants’ motion to temporarily stay proceedings pending final transfer decision by the JPML in a substantially similar case); Text Order, *City of Saratoga Springs*, No. 1:19-cv-00789, Dkt. No. 79 (same); Text Order, *City of Rochester*, No. 6:19-cv-06490, Dkt. No. 62 (same); Order at 2–3, *Franklin Cty. v. Purdue Pharma L.P.*, No. 7:19-cv-00302 (W.D. Va. May 1, 2019), Dkt. No. 33 (“this case and those like it present issues of national importance with national implications . . . [i]n the interest of judicial economy and to achieve uniform disposition of the issues central to these cases, the court will exercise its discretion to forego consideration of Franklin County’s [remand] motion[] so that the JPML may adjudicate the objections to transfer of these cases”). The rationale is simple: where a jurisdictional issue “is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation,” and “involves common questions of law and fact,” “[c]onsistency as well as economy is . . . served” by having the jurisdictional objections “heard and resolved by a single court” *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990).

Moreover, there is no merit to Plaintiff’s argument that “[a] transfer of the case to the federal court, especially into an MDL, will . . . severely prejudice Plaintiff” because “this action . . . should be part of the New York coordinated litigation.” *See* Dkt. No. 15 at 6. Any potential prejudice to Plaintiff is slight. Although the action, *In re Opioid Litigation*, Index No. 400000/2017 (N.Y. Sup. Ct. 2017), is pending in Suffolk County Supreme Court, none of the dozens of actions being litigated therein involves the Moving Defendants—thus, no case management or pretrial proceedings have commenced relating to the Moving Defendants. Indeed, Plaintiff has expended limited resources to date, as this action is still in its infancy, and discovery has not yet begun.

Furthermore, if this action is transferred to the Opiate MDL, Plaintiff can raise any jurisdictional objections to the MDL Court. And in the unlikely event that the JPML does not

transfer this case to the Opiate MDL, this Court can hear and decide any jurisdictional objections raised by Plaintiff at that time. “The question is not whether there will be a decision on the jurisdictional issue, but rather which court is in the best position to decide it – this Court or the MDL court.” *Med. Soc’y of N.Y. v. Conn. Gen. Corp.*, 187 F. Supp. 2d 89, 92 (S.D.N.Y. 2001).

Conversely, the Moving Defendants have been litigating virtually identical claims in the Opiate MDL for nearly twenty months, and are named defendants in the second bellwether track established by Judge Polster. The Moving Defendants should not be forced to engage in unnecessary and duplicative discovery and motion practice, or to risk inconsistent rulings on important jurisdictional issues. *See Lee v. Equifax Info. Servs., LLC*, 2018 WL 8139008, at *1 (E.D.N.Y. Aug. 6, 2018) (“[I]f the case is not stayed pending the JPML’s transfer decision, defendant will be prejudiced by having to defend duplicative proceedings and motions, with the potential for inconsistent and/or inefficient discovery demands and obligations.”). The Court should deny Plaintiff’s motion to expedite.

CONCLUSION

Accordingly, any delay in a ruling on a decision to remand is far outweighed by the hardship to the Moving Defendants and risk of inconsistent rulings. For the foregoing reasons, Plaintiff’s motion for expedited treatment of its remand motion should be denied.

Dated: October 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2019, the foregoing document was electronically served upon all attorneys of record. Other notice is being sent to the parties via U.S. Mail Postage Prepaid.

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